

**THE NEBRASKA HOSPITAL-MEDICAL LIABILITY ACT**  
**A SYNOPSIS PREPARED BY THE NEBRASKA MEDICAL ASSOCIATION**

The Nebraska Hospital-Medical Liability Act (Secs. 44-2801 et seq. R.R.S. Neb. 1943, as amended), was passed by the 1976 Legislature. The Act has been revised through amendments in 1984, 1986, 1988, 1992 and 1993. Sponsored by the Nebraska Medical Association, the Act was held to be constitutional by the Nebraska Supreme Court in 1977. The Act includes only professional liability issues associated with the actions of physicians, nurse anesthetists and certain medical facilities, i.e., hospitals. This synopsis discusses the Act's basic features; because of the Act's complexity, the full Act should be consulted to answer technical questions which may arise.

QUALIFICATION UNDER THE ACT

Neither patients nor physicians are obligated to be covered under this law. All previously existing legal remedies remain in effect and may be exercised if so elected.

If a patient does not wish to be included under the Nebraska Hospital-Medical Liability Act, that patient or his or her representative must make a written election to be excluded to the Insurance Director of the State of Nebraska in advance of treatment and must renew this election every two years. Furthermore, the patient must notify his physician as soon as is "reasonable under the circumstances" that he has so elected.

Physician inclusion under the Act, on the other hand, requires equally positive action on the physician's part which includes:

- (a) Obtaining a \$200,000/\$600,000 basic professional liability insurance policy from an insurance company qualified in Nebraska;
- (b) Sending proof of this coverage to the Department of Insurance;
- (c) Making annual payment of a dollar amount not to exceed 50% of the premium of the basic liability insurance coverage. (This surcharge amount will be determined annually by the Director of Insurance.) This money will be used to maintain the "Excess Liability Fund," and
- (d) Displaying in a suitable location an approved notice that the physician has elected to be included under the Act.

## LIMITS OF LIABILITY

If the patient has properly qualified himself for exclusion or if a physician has not qualified himself for inclusion under the Act, there is no limit of liability. If, on the other hand, both the patient and the physician are covered under the Act, the physician's liability is limited to the extent of his basic insurance coverage. The total patient award, however, may not exceed: (a) \$500,000 for claims arising prior to January 1, 1985, (b) \$1,000,000 for claims arising after December 31, 1984 and on or before December 31, 1992, (c) \$1,250,000 for any occurrence after December 31, 1992. The difference, then, between the physician's basic insurance coverage and the recovery limit, would be paid from the Excess Liability Fund.

Important to the limits of liability and premium rates for coverage are numerous other provisions of the Act which delineate other aspects of the finances, such as time and method of payment to the Plaintiff.

## EXCESS LIABILITY FUND

The Act obligates the State Insurance Director to do a number of things, one of which is to create and manage an Excess Liability Fund to pay anticipated claims. This fund has been created by surcharges against the medical providers who have qualified under the Act. These surcharges may not exceed 50% of the premiums of the basic insurance coverage of the providers. The surcharges may vary pro rata according to the type of medical provider for whom payments have been made from the fund. An additional "special surcharge" may be levied if the fund is inadequate to pay in full all allowed claims.

## INFORMED CONSENT

Strict limitations are delineated on claims based on a lack of "informed consent." This term means consent to a procedure based on information which would ordinarily be provided to the patient, including a case in which a reasonably prudent health care provider would have obtained consent under similar circumstances.

### MEDICAL REVIEW PANEL

The Act provides for optional use of a three physician/one attorney medical review panel to review medical liability claims to the court filing of such claim. A patient may elect to present the claim to such a panel or proceed directly to court. To initiate a claim against a health care provider, the patient must serve written notice upon the State Director of Insurance.

The duties, obligations and proceedings of the panel are strictly defined in the Act. While the findings of the panel will be matters of public record, the proceedings of the panel will be confidential. A detailed explanatory booklet prepared by legal counsel to the Nebraska Medical Association is available to each physician panelist.

### MEDICAL QUALIFICATIONS COMMISSION

The Act creates a Medical Qualifications Commission composed of five physician members which shall serve as a subcommittee of the Board of Examiners in Medicine and Surgery. The function of this Commission is to receive and evaluate complaints concerning qualifications of Nebraska physicians. The Commission is empowered and obligated to pursue investigation of the complaints by all means available, including subpoena of the involved parties. Proceedings of these investigations are reported to the Board of Examiners in Medicine and Surgery and to the Director of Health. If, after due process of law, the Director of Health finds good cause therefore, he may order revocation of license or such other action short of revocation as he determines to be advisable.

The proceedings of the Commission are confidential, and its members immune from civil liability.

### MISCELLANEOUS INCLUSIONS UNDER THE ACT

- (a) Express or implied contracts assuring results cannot be claimed unless the contract is in writing and signed by the physician or his authorized agent.
- (b) No dollar amount can be included in a petition demand, but the petition shall ask for such damages as are "reasonable in the premises."
- (c) The Court has authority to limit attorneys' fees upon motion of either party.

- (d) A residual malpractice insurance authority is created. Under this section of the Act, the State Insurance Director is empowered with the authority to engage in writing medical malpractice insurance. To this end, a risk manager is to be appointed whose obligation is to create and manage an insurance plan appropriate for coverage of such health care providers as have been declined by at least two commercial insurers.
- (e) If a malpractice action is brought in court and the court finds that the losing party had no reasonable chance of recovery or chance of successful defense, the court has the right to assess the reasonable costs of trial, including attorneys' fees and loss of earnings against the losing party.
- (f) A limitation on the "Collateral Source" rule (governing outside payment sources) was enacted which reduces the size of judgment awards in some instances.

Physicians opting to participate under the protection of this statute are required to do the following:

1. Obtain a \$200,000/\$600,000 basic professional liability policy from an insurance company qualified in Nebraska;
2. Mail the following to the Department of Insurance, State of Nebraska, Terminal Building, 941 "O" Street, Suite 400, Lincoln, NE 68508.
  - A. A certificate from your insurance agent which evidences your primary coverage, states that amount of the premium, and shows the date of the coverage. This must be done annually.
  - B. A check payable to the Nebraska Excess Liability Fund in the amount of 5% of the cost of your basic coverage in order to cover your contribution to the excess fund. This must be done annually.
3. Post the sign in your office noting participation under the Act.